11-22-2016

State v. McCallum Respondent's Brief Dckt. 43701

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 43701 & 43738**
Plaintiff-Respondent,	)	
	)	**Elmore County Case Nos.**
v.	)	**CR-2012-2834 & CR-2014-4239**
	)	
JUSTIN LYNN McCALLUM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

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STATEMENT OF THE CASE

Nature of the Case

Justin Lynn McCallum appeals from the judgment of conviction entered upon the jury verdicts finding him guilty of lewd conduct with a minor under 16 and felony destruction of evidence, from the district court's order revoking his probation and executing the sentence previously imposed upon his conviction for aiding and abetting the delivery of a controlled substance, and from the district court's order denying his I.C.R. 35(b) motion for reduction of sentence.

Statement of Facts and Course of Proceedings

In November 2011, the Elmore County Sheriff's Office received information that McCallum and his cousin were using and selling marijuana. (2/14/13 PSI, p.3; R., Vol. I, pp.14-15.) The Sheriff's Office utilized a confidential informant to make four separate marijuana purchases from McCallum's cousin. (2/14/13 PSI, p.3; R., Vol. I, pp.14-15.) McCallum was present at two of these transactions. (R., Vol. I, pp.14-15.)

The state charged McCallum with two counts of aiding and abetting delivery of a controlled substance and misdemeanor possession of drug paraphernalia. (R., Vol. I, pp.52-53.) Pursuant to a plea agreement, McCallum pled guilty to one count of aiding and abetting delivery, and the state agreed to dismiss the remaining counts. (R., Vol. I pp.65-66, 68-71.) In February 2013, the district court imposed a unified four-year sentence with one year fixed, but suspended the sentence and placed McCallum on probation for three years. (R., Vol. I, pp.75-79.)

In January 2014, the parents of 13-year-old A.M. found out that she was using marijuana and distributing pills to friends. (Trial Tr., p.140, Ls.2-3; p.142, L.8 – p.143, L.8.) A.M.'s parents grounded her and made her go to Narcotics Anonymous meetings for several months. (Trial Tr., p.143, Ls.6-23; p.195, Ls.7-20.) There, A.M. met McCallum. (Trial Tr., p.145, Ls.5-7.) After developing a close relationship, McCallum asked A.M. to send him nude photos of her. (Trial Tr., p.145, L.5 – p.149, L.9.)

On July 5, 2014, A.M. was staying at her grandmother's house. (Trial Tr., p.153, Ls.22-24.) That night, following a text exchange with McCallum, A.M. snuck out of her grandmother's house and went to McCallum's house. (Trial Tr., p.155, L.8 – p.156, L.11.) There, McCallum had sex with A.M. in his yard. (Trial Tr., p.158, L.25 – p.169, L.10.) Over the next few weeks, McCallum continued to exchange flirtatious and sexually explicit text messages with A.M. (Trial Tr., p.171, L.23 – p.176, L.3; State's Exhibits 1, 4-8.)

Shortly after the final text exchange between McCallum and A.M., A.M.'s mother took A.M.'s cell phone from her. (Trial Tr., p.176, L.4 – p.177, L.18; p.199, Ls.21-23.) Knowing that her phone contained sexually explicit text messages exchanged between her and McCallum, A.M. told her mother and step-father that she had sex with McCallum. (Trial Tr., p.178, L.1 – p.179, L.22; p.201, Ls.7-23.) McCallum's mother read the text messages and then called the police. (Trial Tr., p.202, L.4 – p.204, L.14.)

Officers met with A.M. and took possession of her cell phone. (Trial Tr., p.238, L.17 – p.240, L.9.) Another officer, Sgt. Russell Griggs, made contact with

McCallum by phone. (Trial Tr., p.246, L.21 – p.252, L.1.) Sgt. Griggs informed McCallum, who was on felony probation for the delivery charge at the time, that he needed to turn over his cell phone to law enforcement. (Id.) On July 24, 2014, after Sgt. Griggs contacted McCallum about his phone, McCallum informed his probation officer that he had a new phone number. (Trial Tr., p.231, L.14 – p.232, L.18.)

Sgt. Griggs eventually recovered McCallum's cell phone. (Trial Tr., p.255, Ls.9-24.) McCallum told Sgt. Griggs that he had done a factory reset on the phone, resulting in the deletion of the phone's contents, prior to handing it over to law enforcement. (Trial Tr., p.256, L.16 – p.257, L.23.) Later at trial, Sgt. Griggs would testify that McCallum told him that he performed the factory reset after he had lost the phone at a lake, and "something to the effect of because of the girl thing and [because] people are trying to get him back in to the drug and alcohol scene." (Trial Tr., p.258, Ls.12-21.) Officers were able to recover numerous text messages sent between McCallum and A.M. from A.M.'s phone, and were able to obtain McCallum's cell phone records through Verizon Wireless. (State's Exhibits 1-11; Trial Tr., p.301, L.14 – p.324, L.6.)

The state charged McCallum with lewd conduct with a minor under 16 and felony destruction of evidence. (R, Vol. II, pp.229-230.) The state also filed a motion for probation violation in McCallum's delivery case. (R., Vol. I, pp.91-127.) The state alleged that McCallum violated his probation by committing the new crimes of lewd conduct and destruction of evidence, failing to obtain a treatment sponsor, failing to maintain employment or complete the required

number of employment contacts, and associating with individuals with a history of illegal drug use without permission. (R., Vol. I, pp.91-93.)

Prior to McCallum's trial for lewd conduct and destruction of evidence, the state filed a notice of intent to introduce I.R.E. 404(b) evidence at the trial. (R., Vol. II, pp.257-270, 281-301.) Among the evidence the state sought to admit were various text messages between McCallum and A.M. sent in June and July 2014. (Id.) McCallum objected to the admission of the text messages. (6/19/15 Tr., p.31, Ls.20-25.) The district court concluded that the text messages were admissible under I.R.E. 404(b) because they were relevant for purposes other than demonstrating criminal propensity; and that the probative value of the messages was not substantially outweighed by the potential for unfair prejudice pursuant to I.R.E. 403. (6/19/15 Tr., p.32, L.1 – p.33, L.10.) The district court qualified its ruling by noting that the state still had to lay adequate foundation for the text messages, and that a limiting instruction might be appropriate. (Id.)

At trial, the state successfully admitted the text messages into evidence. (State's Exhibits 1, 4-11.) A.M. testified at trial about her relationship with McCallum and about her sexual activity with McCallum that occurred on July 5-6, 2014. (Trial Tr., p.139, L.3 – p.193, L.11.) The jury found McCallum guilty of both lewd conduct with a minor under 16 and felony destruction of evidence. (R., Vol. II, pp.375-376.) At an evidentiary hearing conducted after the trial but before the sentencing hearing, McCallum admitted to violating his probation in the delivery case. (R., Vol. I, p.172.)

The district court imposed a unified 25-year sentence with five years fixed for lewd conduct, and a concurrent five-year fixed sentence for felony destruction of evidence. (R., Vol. II, pp.386-389.) The district court also revoked McCallum's probation in the delivery case and ordered his original sentence executed, to run concurrently with his sentences for lewd conduct and felony destruction of evidence. (R., Vol. I, pp.176-181.) Approximately three months later, the district court denied McCallum's I.C.R. 35(b) motion for reduction of sentence. (R., Vol. II, pp.414-420.)

McCallum timely appealed from both the judgment of conviction entered upon the jury's verdict finding him guilty of lewd conduct and felony destruction of evidence, and from the district court's order revoking his probation and executing the sentence previously imposed upon his conviction for aiding and abetting the delivery of a controlled substance. (R., Vol. I, pp.182-185; Vol. II, pp.398-401.) The Idaho Supreme Court consolidated these two cases for appeal. (12/3/15 Order.)

ISSUES

McCallum states the issues on appeal as:

1. Is there sufficient evidence to support the conviction for felony destruction of evidence?

2. Did the district court err in admitting irrelevant text messages?

3. Did the district court abuse its discretion when it revoked Mr. McCallum's probation in the delivery case?

4. Did the district court abuse its discretion in sentencing Mr. McCallum to twenty-five years fixed, following his conviction for lewd conduct and felony destruction of evidence?

5. Did the district court abuse its discretion when it denied Mr. McCallum's Idaho Criminal Rule 35 Motion?

(Appellant's brief, p.8)

The state rephrases the issues on appeal as:

1. Has McCallum failed to demonstrate that the state presented insufficient evidence to support his conviction for felony destruction of evidence?

2. Has McCallum failed to demonstrate that the district court abused its discretion by admitting the text messages into evidence?

3. Does the doctrine of invited error preclude McCallum's contention that the district court abused its discretion by revoking probation and executing the sentence previously imposed upon his conviction for aiding and abetting the delivery of a controlled substance?

4. Has McCallum failed to demonstrate that the district court abused its sentencing discretion?

5. Has McCallum failed to demonstrate that the district court abused its discretion by denying his I.C.R. 35 motion for reduction of sentence?

ARGUMENT

I.
McCallum Has Failed To Demonstrate That The State Presented Insufficient Evidence To Support His Conviction For Felony Destruction Of Evidence

A. Introduction

McCallum contends that the state presented insufficient evidence to support his conviction for felony destruction of evidence. (Appellant's brief, pp.9-12.) Specifically, McCallum asserts that the state did not present any evidence that the investigation associated with the information on McCallum's phone was a *felony* investigation. (Id.) McCallum's claim fails because the state presented evidence from which a rational trier of fact could infer that McCallum knowingly destroyed evidence of a felony investigation, and because the jury was specifically instructed that a lewd conduct investigation is a *felony* investigation.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112

Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence From Which A Rational Trier Of Fact Could Infer That McCallum Destroyed Evidence To Conceal It From A Felony Investigation. In Any Event, McCallum Stipulated That A Lewd Conduct Investigation Is A Felony Investigation, And The Jury Was So Instructed

Idaho Code § 18-2603 provides that an individual commits the crime of felony destruction of evidence when he "willfully destroys, alters or conceals" evidence knowing that the evidence "is about to be produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation" that "is criminal in nature and involves a felony offense."

In State v. Yermola, 159 Idaho 785, 367 P.3d 180 (2016), the Idaho Supreme Court clarified what evidence is required for the state to prove that a defendant's destruction of evidence relates to an investigation that "involves a felony offense," and thus, constitutes felony, rather than misdemeanor, destruction of evidence. The Court first held that the offense of felony destruction of evidence does not require proof that the evidence destroyed tends to demonstrate the commission of a felony, it only requires proof that the defendant knows that the evidence was about to be discovered in an investigation that, as the language of the statute provides, "involves a felony." Yermola, 159 Idaho at __ n.2, 367 P.3d at 182 n. 2 (abrogating State v. Peteja, 139 Idaho 607, 83 P.2d 781 (Ct. App. 2003).) The Court further held that in order to prove that an investigation "involves a felony," the state must prove that the

"subject criminal offense" of the investigation is a felony offense. Id. at ___, 367 P.3d at 182-184. The Court concluded that the state failed to present any evidence at Yermola's trial that the subject criminal offense in that case was a *felony* offense, and that identifying the subject offense as "Grand Theft" in the jury instructions did not constitute such evidence. Id. at ___, 367 P.3d at 184.

While it acknowledges Yermola, the state asserts that there was sufficient evidence presented at the jury trial in the present case from which a rational fact-finder could reasonably infer that the investigation into McCallum's sexual relationship with 13-year-old A.M. was an investigation that involved a felony offense. Jurors are permitted to make reasonable inferences regarding the evidence presented to them, and the state is not required to present evidence conforming to the specific wording of the criminal statute. See State v. Lemmons, 158 Idaho 971, 975, 354 P.3d 1186, 1190 (2015); State v. Herrera–Brito, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998). In this case, it was reasonable for the jury to infer that the investigation into A.M.'s allegation that she had sex with McCallum in his yard was an investigation that involved a felony offense, rather than a misdemeanor offense. Further, because the state presented substantial evidence that McCallum destroyed evidence relating to the investigation of an offense (lewd conduct) which *is* a felony, McCallum has failed to demonstrate error.

Additionally, in the present case, unlike in Yermola, the jury was specifically instructed that "[t]he investigation of Lewd Conduct with a Minor Under Sixteen is a felony investigation authorized by law." (R., Vol. II, p.353;

Trial Tr., p.377, Ls.14-16.) McCallum expressly declined to object to this instruction.[1] (Trial Tr., p.367, Ls.19-25.) Therefore, the parties essentially stipulated that the "subject criminal offense" in this case was a felony.

There was no reason for the state to present specific evidence at trial that lewd conduct was a felony offense when McCallum ultimately stipulated to the fact that it was, and when the jury was so instructed. Therefore, even if the state failed to present evidence from which a rational fact-finder could conclude that lewd conduct with a minor under 16 was a felony, such evidence was unnecessary in this case.

Sufficient competent evidence was presented at trial from which a rational fact-finder could conclude beyond a reasonable doubt that the subject criminal offense associated with McCallum's destruction of evidence was a felony offense. In any event, the jury was specifically instructed that a lewd conduct investigation was a felony investigation. This Court should therefore affirm McCallum's conviction for felony destruction of evidence.[2]

---

[1] While the district court initially identified this instruction as "No. 18," the court ultimately re-numbered the instructions (see Trial Tr., p.368, Ls.10-22), after which, Instruction No. 18 became No. 17 (R., Vol. II, p.353).

[2] Because McCallum does not contend that the evidence for felony destruction of evidence was lacking regarding any element of the crime other than whether the subject criminal offense of the investigation was a *felony* offense, this Court should, if it concludes that the state failed to present sufficient evidence to support this element, vacate the judgment of conviction and instruct the district court to sentence McCallum on the related I.C. § 18-2603 misdemeanor offense. See Yermola, 159 Idaho at __, 367 P.3d at 184.

II.
McCallum Has Failed To Demonstrate That The District Court Abused Its Discretion By Admitting The Text Messages Into Evidence

A. Introduction

McCallum contends that the district court abused its discretion by admitting certain text messages between McCallum and A.M. into evidence at the trial. (Appellant's brief, pp.12-23.) McCallum's argument fails because the text messages were relevant for purposes other than demonstrating criminal propensity, and because the probative value of the messages was not substantially outweighed by the potential for unfair prejudice. Further, even if the court erred in admitting the challenged text messages, any such error was harmless in light of the other evidence of McCallum's guilt presented at trial.

B. Standard Of Review

Relevance is a question of law reviewed de novo, while balancing under I.R.E. 403 is reviewed for an abuse of discretion. State v. Norton, 151 Idaho 176, 190, 254 P.3d 77, 91 (Ct. App. 2011). Rulings under I.R.E. 404(b) are also reviewed under a bifurcated standard: whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

In reviewing a trial court's discretionary decision, this Court evaluates whether the trial court correctly perceived the decision as discretionary, whether the trial court acted within the boundaries of its discretion and consistent with

legal standards, and whether the court exercised reason in making its decision. Norton, 151 Idaho at 190, 254 P.3d at 91.

C. The District Court Acted Well Within Its Discretion In Admitting The Text Messages Into Evidence

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence that tends to prove the existence of a fact of consequence in the case, and has any tendency to make the existence of that fact more probable than it would be without the evidence, is relevant. State v. Hocker, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). "Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b)." State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted). Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993). In Grist, *supra*, the Idaho Supreme Court set forth a two-tiered analysis to determine the admissibility of evidence under I.R.E. 404(b). State v. Naranjo, 152 Idaho 134, 138, 267 P.3d 721, 725 (Ct. App. 2011). "The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity." Id. (citing Grist, 147 Idaho at 52, 205 P.3d at 1188).

The second step in a 404(b) analysis involves a determination of whether the evidence, although relevant, should be excluded because the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003). Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by the Idaho Supreme Court: "Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. As long as the

evidence is relevant to prove some issue other than the defendant's character and its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice, it is not error to admit it. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999).

In this case, prior to trial, the state filed a notice of intent to introduce I.R.E. 404(b) evidence. (R., Vol. II, pp.257-270, 281-301.) Among the evidence the state sought to admit were various text messages between McCallum and A.M. sent between June and July 2014. (R., Vol. II, pp.257-270, 281-301.) Some of the text messages were sent prior to July 5-6, 2014,[3] the evening the charged act of lewd conduct took place at McCallum's residence, and some of the messages were sent after that evening.

The following text messages,[4] which were later admitted at trial, were sent before July 5-6, 2014:

> June 26, 2014, 1:25 p.m.
>
> McCallum: Ur good n I'll still be here to help just can't be saying some the stuff I was, Im 28 n was flirting with a 13 yr old which is not good plus I never got wat I was askin for so u obviously weren't to interested anyway lol

(State's Exhibit 11.)

> June 28, 2014, 1:28 a.m.
>
> McCallum: That ages are only numbers

[3] A.M. testified that she left her grandmother's house to go to McCallum's house between 11:30 p.m. and midnight on July 5, 2014, and that she returned at approximately 3:00 a.m. on July 6, 2014. (Trial Tr., p.155, L.23; p.169, Ls.9-22.)

[4] The state quotes all of the text messages verbatim, without corrections to spelling, grammar, capitalization, or punctuation.

(State's Exhibit 9.)

June 28, 2014, 10:47 a.m.

McCallum: My whole issue of trust would come in the form of gossip…I know I wouldn't be saying anything to ANYONE lol could I trust the same with u?

(State's Exhibit 10.)

The following text messages, which were later admitted at trial, were sent after July 5-6, 2014:

July 10, 2014, 11:08 AM – 11:36 a.m.

McCallum: I'm picky n Ur a good pick that's just how it is

McCallum: Believe it or not Ur the only chick I'm talking to today

McCallum: So Ur feinding for a lil more of the big deal huh?

McCallum: I think it's great looking…Pretty face perky tits great ass and tight sweet lil pussy Mmmmhmmm

(State's Exhibits 5-8.)

July 12, 2014, 2:03 a.m.

McCallum: I felt Ur pussy…doesn't seem like you give it up ever lol n I was thinkin more damn Ur fun

(State's Exhibit 4.)

July 12, 2014, 8:00 a.m.– 9:00 a.m.[5]

McCallum: Y not?

McCallum: Y.

[5] State's Exhibit 1 contains a "Column1" which indicates the actual time that each text message was sent. This information was converted from the time data extracted from the phone. (Trial Tr., p.341, L.8 – p.344, L.3.) Additionally, for clarity, the state quotes these text messages in chronological order, rather than in the reverse-chronological order that they were arranged by on the exhibit. (See State's Exhibit 1.)

A.M.: Y not what ?

McCallum: U said it wasn't for me

A.M.: Yeah. That text. Other than that its all yours. ;)

McCallum: Where's my pic? :(

A.M.: You can wait.

McCallum: Then u can to ;-)

A.M.: :(You cant do that. Thats not fair! That didn't happen last time! Nd we still did it.

McCallum: Yup I know but u keep teasing me

A.M.: No im not.

McCallum: Remember the here it Is come get it pics lol

McCallum: You told me u would :(

A.M.: Yeah. U said I didnt!

A.M.: Nd I was talking future wise .

McCallum: I wanted u to

McCallum: :(

McCallum: Imma cry

A.M.: Mhmmmm sure.

McCallum: I am very sad

A.M.: Why?

McCallum: Cause Ur body looks so amazing n I can't see it

A.M. (to mother): Can u pick me up at 9:15. Cause we have to drop off [A.M.'s friend] somewheref

McCallum: I'm pouting now

A.M.: That's a lieeeee. Plus wouldn't you rather hold my amazing body and caress it instead? ;)

McCallum: Imma do that also

McCallum: But I really am sad :(

A.M.: Awh. Well you could be sad all you want but it aint going to get you anywhere.

McCallum: Why u gotta be mean…U know the great sex is worth it ;)

A.M.: Cause im a bitch.(: and I know its worth it. ;)

McCallum: maybe I should Put it in Ur butt lol ;)

A.M.: Aint nobody will be happy with that one sweetheart. (;

McCallum: Who u referring to?

A.M.: Who do you think?

McCallum: U?

A.M.: there ya go sweetie. ;)

McCallum: I'd be easy

A.M.: Mhmmm sure.

McCallum: Watcha mean?

A.M.: nothing nevermind.

McCallum: I would let you push on it n control the speed n depth

A.M.: Oh really? I like being in control! ;)

A.M. (to mother): Im here

McCallum: Ur lol ass is virgin huh

McCallum: Lil*

A.M. (to mother): K hold on.

A.M.'s mother: Now!

A.M.: Why would it not be?

McCallum: Idk lol ur naughty

A.M.: oh really?

McCallum: Lol I don't know war u have n haven't done lol I just know I was Ur second time in that sweet tight pussy

McCallum Wat*

A.M's mother: U got 30seconds!

(State's Exhibit 1.)

At a pretrial hearing, McCallum objected to the admission of these text messages. (6/19/15 Tr., p.31, Ls.20-25.) The district court concluded that the text messages were admissible under I.R.E. 404(b) because they were relevant for purposes other than demonstrating criminal propensity; and that the probative value of the messages was not substantially outweighed by the potential for unfair prejudice pursuant to I.R.E. 403. (6/19/15 Tr., p.32, L.1 – p.33, L.10.) The district court qualified its ruling by noting that the state still had to lay adequate foundation for the text messages, and that a limiting instruction might be appropriate. (Id.) The state ultimately laid adequate foundation for the text messages, and each message was admitted into evidence at trial. (State's Exhibits 1, 4-11.) McCallum later declined to request a limiting instruction. (Trial Tr., p.382, L.5 – p.383, L.6.)

On appeal, McCallum contends that "any texts after July 6, 2014 that did not explicitly discuss acts that had already occurred could not be relevant to prove the lewd conduct charge." (Appellant's brief, p.22.) Therefore, McCallum

does not appeal the admission of the portion of the text message exchange from July 12, 2014, that specifically references McCallum's and A.M.'s sexual activity that occurred on July 5-6, 2014. (Appellant's brief, p.19.) Nor does McCallum assert on appeal that there was insufficient evidence to establish the "other acts" evidenced by the text messages. (See Appellant's brief, pp.12-23.) A review of the record supports the district court's decision to overrule McCallum's objection and to admit each of the submitted text messages into evidence.

In State v. Scovell, 136 Idaho 587, 590-591, 38 P.3d 625, 628-629 (Ct. App. 2001), the Idaho Court of Appeals held that evidence of Scovell's uncharged incidents of sexual misconduct with the same victim who was the subject of the indictment was relevant and did not violate I.R.E. 404(b). The Court of Appeals noted that there were "[a]dditional cases affirming the admission of evidence of the defendant's prior or subsequent uncharged sexual misconduct with the same victim." Id. (citing State v. Tapia, 127 Idaho 249, 256, 899 P.2d 959, 966 (1995); State v. Lewis, 123 Idaho 336, 350–351, 848 P.2d 394, 408–409 (1993); and State v. Hansen, 127 Idaho 675, 680, 904 P.2d 945, 950 (Ct. App. 1995)).

Subsequently, in Grist, the Idaho Supreme Court clarified the scope of I.R.E. 404(b) as it pertains to the admissibility of evidence of sexual misconduct admitted for the purposes of establishing a "common scheme or plan" of abuse, or for demonstrating the credibility of a victim. Grist, 147 Idaho at 51-55, 205 P.3d at 1187-1191. The Court emphasized that "trial courts must carefully scrutinize evidence offered as 'corroboration' or as demonstrating a 'common

scheme or plan' in order to avoid the erroneous introduction of evidence that is merely probative of the defendant's propensity to engage in criminal behavior." Id. at 53, 205 P.3d at 1189.

Grist (which analyzed the admissibility of evidence of Grist's sexual misconduct with individuals *other* than the victim of the charged conduct), therefore partially overruled several Idaho cases which had interpreted I.R.E. 404(b) as more broadly permitting the state to present evidence of defendants' prior uncharged sexual misconduct. However, Grist did not abrogate the general underlying principle of Scovell and related cases that evidence of sexual misconduct involving the *same victim*, especially when the other misconduct is close in time to the charged conduct, is more likely to be admissible for non-propensity purposes than evidence of other types of uncharged conduct. See also Noel v. Commonwealth, 76 S.W.3d 923, 931 (Ky. 2000) ("evidence of similar acts perpetrated against the same victim are almost always admissible for those [K.R.E. 404(b)] reasons."); Lattimer v. State, 952 So.2d 206, 215-216 (Miss. Ct. App. 2006) (Holding that evidence of other alleged sexual relations between defendant and victim, even though incident was not alleged in indictment, was admissible in sexual battery prosecution pursuant to M.R.E. 404(b), since it involved same victim in issue). Further, Grist did not eliminate the state's ability to admit evidence of a defendant's uncharged sexual misconduct for a permissible I.R.E. 404(b) purpose as long as the evidence actually "serves its articulated purpose." State v. Osterhoudt, 155 Idaho 867, 872, 318 P.3d 636, 641 (Ct. App. 2013) (citing Grist, 147 Idaho at 55, 205 P.3d at 1191).

In this case, with respect to the felony destruction of evidence charge, the admitted text messages were plainly relevant for the permissible I.R.E. 404(b) purposes of proving that McCallum had the motive and intent to perform a factory reset on his phone in order to attempt to conceal evidence of the nature of his relationship with A.M. from law enforcement. In fact, where the state faced the burden of proving that McCallum destroyed the text messages with the specific intent to conceal them from law enforcement, the state submits that it was entitled to introduce the text messages themselves into evidence, to demonstrate that they would be of interest to law enforcement. Each of the admitted text messages was relevant for this purpose.

Additionally, with respect to the lewd conduct charge, the admitted text messages illustrated the flirtatious and sexually intimate nature of McCallum's relationship with A.M. The messages were sent within weeks of the sexual misconduct for which McCallum was charged. As the district court concluded (6/19/05 Tr., p.32, Ls.6-21), this tended to prove McCallum's motive and intent in committing the crime of lewd conduct.

The text messages also corroborated much of A.M.'s trial testimony. A witness' credibility is always relevant. State v. Hairston, 133 Idaho 496, 503, 988 P.2d 1170, 1177 (1999); Osterhoudt, 155 Idaho at 874, 318 P.3d at 643. Further, in this case, in light of A.M.'s detailed testimony regarding the lewd conduct (Trial Tr., p.155, L.8 – p.169, L.10), credibility was a central issue for the jury's consideration. The text messages were consistent with the direct examination testimony of A.M., who described how her relationship with

McCallum evolved from him being an "older brother figure," to flirtations, to ultimately culminating in sexual activity. (Trial Tr., p.145, L.5 – p.169, L.10.)

Additionally, as the district court properly concluded (6/19/05 Tr., p.32, L.25 – p.33, L.4), the probative value of the evidence for the above purposes was not substantially outweighed by the potential for unfair prejudice. The potential for unfair prejudice was particularly limited in this case because, unlike in many other I.R.E. 404(b) cases which analyze the admissibility of evidence of a defendant's prior sexual misconduct, the challenged texts do not actually reference any other sexual activity occurring between A.M. and McCallum. Instead, in the challenged text message exchanges, A.M. and McCallum discussed the age gap between them, McCallum's trust issues, and McCallum's desire to engage in future sexual activity with A.M. While these matters were probative in terms of demonstrating McCallum's motive and intent to engage in lewd conduct and to destroy evidence, for providing context for the sexual relationship between McCallum and A.M., and for corroborating A.M.'s trial testimony, they did not create any significant risk that the jury would reach its verdict on some improper basis.

McCallum has failed to show that the district court erred in concluding that the text messages were relevant for purposes other than demonstrating criminal propensity, and that the probative value of the messages was not substantially outweighed by the danger of unfair prejudice. This Court should therefore affirm McCallum's convictions for lewd conduct and felony destruction of evidence.

D. Even If The District Court Erred In Admitting The Text Messages, Any Such Error Was Harmless

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ….” I.R.E. 103(a). See also I.C.R. 52 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). “The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence.” State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)).

In this case, even if the district court erred in admitting some or all of the challenged text messages, any such error was harmless in the circumstances of this case. For similar reasons as discussed above as to why the risk of unfair prejudice from the admission of the challenged text messages was limited, exclusion of the messages also would not have resulted in an acquittal. The challenged messages do not reference or contain admissions to any sexual activity actually engaged in by McCallum and A.M. It is unlikely that, in a trial which contained testimony from A.M., and text message admissions from McCallum that he had engaged in sexual activity with A.M., the jury’s verdicts actually turned on the challenged text messages that did not reference such activity.

For these reasons, and in light of the other evidence of guilt as described in the Statement of Facts and Course of Proceedings of this brief, and as summarized by the prosecutor in her closing argument (Trial Tr., p.386, L.22 –

p.396, L.1; p.399, L.16 – p.401, L.11), the district court's admission of the text messages in this case, if error, was harmless.

III.
The Doctrine Of Invited Error Precludes McCallum's Contention That The District Court Abused Its Discretion By Revoking Probation And Executing The Sentence Previously Imposed Upon His Conviction For Aiding And Abetting The Delivery Of A Controlled Substance

A. Introduction

McCallum contends that the district court abused its discretion by revoking his probation and executing the sentence previously imposed upon his conviction for aiding and abetting the delivery of a controlled substance. (Appellant's brief, pp.23-24.) McCallum's argument is precluded on appeal because he invited any error by recommending the very probation violation disposition that was imposed by the district court. In any event, McCallum has failed to demonstrate that the district court abused its discretion in revoking his probation.

B. Standard Of Review

The decision to revoke probation is reviewed for an abuse of discretion. State v. Roy, 113 Idaho 388, 392, 744 P.2d 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 1021, 842 P.2d 698, 700 (Ct. App. 1992).

C. McCallum's Claim Of Error Is Barred By The Invited Error Doctrine

"The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error." Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). The purpose of the invited error doctrine is

to prevent a party who "caused or played an important role in prompting a trial court" to take a particular action from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). "One may not complain of errors one has consented to or acquiesced in." Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)).

In this case, at the sentencing/probation violation disposition hearing, McCallum concurred with the recommendation of the state that his probation in the delivery case be revoked, and that his sentence in that case be run concurrently with his sentences for lewd conduct and destruction of evidence. (10/13/15 Tr., p.23, L.22 – p.24, L.7; p.27, Ls.6-9.) Because the district court imposed the very probation disposition that McCallum requested (R., Vol. I, pp.176-181; 10/13/15 Tr., p.41, L.11 – p.42, L.6), he cannot claim error in that determination on appeal.

D. The District Court Acted Well Within Its Discretion To Revoke Probation

Even if this Court chooses not to apply the invited error doctrine, McCallum's claim of error is still precluded because he cannot demonstrate an abuse of discretion in the district court's determination.

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); State v. Hass, 114

Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717.

In this case, the district court acted well within its discretion to revoke McCallum's probation on the delivery charge after he was convicted of lewd conduct and destruction of evidence, and after he additionally admitted to violating his probation by associating with individuals with known histories of drug use. (R. Vol. I, pp.105-110, 172.) For these reasons, as well as those discussed below in Sec. IV regarding McCallum's prior criminal history and lack of rehabilitative potential, McCallum has failed to demonstrate that the district court abused its discretion.

IV.
McCallum Has Failed To Demonstrate That The District Court Abused Its Sentencing Discretion

A. Introduction

McCallum contends that the district court abused its discretion by imposing an excessive sentence. (Appellant's brief, pp.25-26.) McCallum has failed to establish that the district court's aggregate unified 25-year sentence with five years fixed for lewd conduct with a minor under 16 and felony destruction of evidence is excessive considering the objectives of sentencing, the nature of the crime, and McCallum's extensive criminal record.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id.

C. The District Court Acted Well Within Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive. Id. To establish that the sentence is excessive, McCallum must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Id.

In this case, prior to imposing sentence, the district court stated that it had considered the appropriate sentencing factors, and was particularly concerned with the protection of the community. (10/13/15 Tr., p.30, Ls.3-7.) The court also stated that it had considered whether probation or a retained jurisdiction was appropriate, as required by I.C. § 19-2521. (10/13/15 Tr., p.40, Ls.5-25.) A review of the nature of McCallum's crimes, his extensive criminal history, and a review of the relevant sentencing materials supports the district court's sentencing determination.

As the district court noted (10/13/15 Tr., p.30, Ls.8-10; p.33, L.14 – p.36, L.4), McCallum has an extensive criminal history. Since 2002, aside from the convictions in the present case, McCallum has obtained convictions for driving a vehicle without the owner's consent, felony conspiracy, driving under the influence, possession of a controlled substance, possession of drug paraphernalia, contempt of court, inattentive driving, driving without privileges, unlawful taking of game, and public intoxication. (9/25/15 PSI, pp.5-8.) McCallum's PSI also lists numerous prior probation violations. (Id.) Further, McCallum was already on probation for aiding and abetting the delivery of controlled substances at the time of his arrest on the lewd conduct and destruction of evidence charges. (R., Vol. I, pp.91-127.)

The nature of McCallum's crimes supports the district court's sentencing determination. McCallum found his victim and initially built their relationship at Narcotics Anonymous meetings, where A.M.'s parents had attempted to help her address her drug issues. (10/13/15 Tr., p.31, Ls.8-16.) As the PSE investigator

observed (9/29/15 PSI, pp.19-20), McCallum's behaviors in pursuing a sexual relationship with A.M. were particularly disturbing as they "were not impulsive but manipulative in nature." The district court discussed how victims of A.M.'s age are particularly vulnerable to older males who, in a predatory manner, demonstrate a romantic interest in the child. (10/13/15 Tr., p.31, L.17 – p.33, L.13.)

McCallum's crimes had a significant impact on A.M. and her family. During the sentencing hearing, A.M.'s mother described how their "lives [had] been turned upside down"; and how A.M. threatened suicide, cut herself, and "started having angry outbursts and severe hostility" in the time since McCallum's criminal conduct. (10/13/15 Tr., p.8, L.2 – p.10, L.19.) In a written statement read at the sentencing hearing, A.M. described how McCallum's conduct negatively impacted her life – she was ashamed to go to school, had trouble sleeping, blamed herself for what happened, had difficulty trusting others, and lost self-esteem. (10/13/15 Tr., p.11, L.8 – p.13, L.3.)

McCallum was evaluated by two psychosexual evaluators, both of whom concluded that McCallum was a moderate risk to re-offend. (10/13/15 Tr., p.36, Ls.5-11; 8/10/15 Evaluation, pp.1-2, 13-14; 9/8/15 Evaluation, pp.1-2, 42.) One of the evaluators concluded that McCallum has an antisocial personality disorder and "can be expected to have some difficulty following rules and following the conditions of a supervised release." (8/10/15 Evaluation, p.13.) The other evaluator noted McCallum's "antisocial, narcissistic, and paranoid personality

characteristics," and concluded that McCallum was "less amenable for sexual offender treatment than most sexual offenders." (9/8/15 Evaluation, pp.1-2, 42.)

The district court's aggregate unified 25-year sentence with five years fixed for lewd conduct with a minor under 16 and felony destruction of evidence was entirely reasonable in light of the objectives of sentencing, the nature of the crime, and McCallum's extensive criminal history. McCallum has therefore failed to demonstrate that the district court abused its sentencing discretion.

V.
McCallum Has Failed To Demonstrate That The District Court Abused Its Discretion By Denying His I.C.R. 35(b) Motion For Reduction Of Sentence

A. Introduction

McCallum contends that the district court abused its discretion by denying his I.C.R. 35(b) motion for reduction of sentence. (Appellant's brief, pp.26-27.) McCallum has failed to demonstrate that the district court erred in declining to reduce his sentence.

B. Standard Of Review

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, McCallum must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id.

C. The District Court Acted Well Within Its Discretion To Deny McCallum's I.C.R. 35(b) Motion For Reduction Of Sentence

McCallum filed an I.C.R. 35(b) motion for reduction of sentence approximately three months after his judgment of conviction for lewd conduct and felony destruction of evidence was entered. (R., Vol. II, pp.408-409.) McCallum did not provide any evidence or supporting documentation with the motion, but asserted that his "previous employers" agreed to re-employ him upon his release, and that his parents "continue to offer him a place to stay and they will assist him to complete any treatment he is required to attend." (Id.)

The district court denied the I.C.R. 35(b) motion. (R., Vol. II, pp.414-420.) After citing the standards applicable to an I.C.R. 35(b) motion determination, the district court reviewed the rationale behind its initial sentencing determination. (Id.) The court reasonably concluded that its sentence fulfilled the appropriate sentencing objectives and that McCallum failed to present any new information that rendered that sentence excessive. (Id.)

A review of the record supports the district court's determination. The fact that McCallum's parents supported him was already known to the court at the time of the initial sentencing. (See 9/29/15 PSI, pp.23-31.) Additionally, McCallum had already asserted to the presentence investigator, prior to sentencing, that he would still have employment with his former employers upon release. (9/29/15 PSI, p.13.) Thus, McCallum's I.C.R. 35(b) motion contained no new information whatsoever.

The district court did not abuse its discretion by denying McCallum's I.C.R. 35(b) motion to reduce his sentence under the circumstances of this case. This

Court must therefore affirm the district court's order denying McCallum's I.C.R. 35(b) motion for reduction of sentence.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction imposed upon the jury verdicts finding McCallum guilty of lewd conduct with a minor under 16 and felony destruction of evidence, the district court's order revoking probation in McCallum's delivery of a controlled substance case, and the district court's order denying McCallum's I.C.R. 35(b) motion for reduction of sentence.

DATED this 22nd day of November, 2016.

_/s/ Mark W. Olson_____
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of November, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd